Filed 5/18/10 P. v. Bolden CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS LEMAR BOLDEN,

Defendant and Appellant.

F058512

(Super. Ct. No. BF126419A)

O P I N I O N

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Donn Ginoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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*Before Wiseman, A.P.J., Levy, J., and Cornell, J.

It was alleged in an information filed March 30, 2009,[1] as follows: appellant Marcus Lemar Bolden committed three felony offenses, viz., possession of cocaine base for purposes of sale (Health & Saf. Code, § 11351.5, count 1), active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a), count 2) and transportation of rock cocaine (Health & Saf. Code, § 11353, subd. (a), count 3); he committed the count 1 and count 3 offenses for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1); and he had served a prison term for a prior felony conviction (Pen. Code, § 667.5, subd. (b)).

On June 19, pursuant to a plea agreement, appellant pled no contest to counts 1 and 2 and admitted the prior prison term enhancement allegation, and the court dismissed count 3, the prior prison term enhancement and the enhancements alleged in connection with counts 1 and 2. Terms of the plea agreement included that appellant would be sentenced to four years in prison and that the count 2 offense would be reduced to a misdemeanor.

On September 8, the court imposed a four-year prison term on count 1 and a concurrent 90-day county jail term on count 2. The court awarded appellant two days of presentence credit.

Prior to entering his plea, appellant filed a notice of motion to suppress evidence. The court conducted an evidentiary hearing on this motion concurrently with appellant's preliminary hearing on March 26. The court denied the motion, by minute order, on March 30. Appellant subsequently renewed his suppression motion; a hearing on the motion was held on May 14, at which no further evidence was presented; and the court denied the motion on May 19.

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[1] All references to dates of events are to dates in 2009.

On September 8, appellant filed a notice of appeal, in which he stated his appeal was based on the denial of his suppression motion.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d. 436.) Appellant has not responded to this court's invitation to submit additional briefing. We will affirm.

FACTUAL AND ADDITIONAL PROCEDURAL BACKGROUND

On January 19, City of Bakersfield Police Officer Dennis Eddy and his partner were on patrol when, at approximately 4:46 p.m., Officer Eddy saw a car stopped in the middle of the street, blocking the roadway, thereby violating a provision of the California Vehicle Code. At that point, the officer stopped the car, which appellant was driving.

Office Eddy detected "the strong odor of burnt marijuana" emanating from the car, and asked appellant if he had any marijuana in the car or on his person. Appellant admitted he had some marijuana on his person and "retrieved his driver's license ...." Officer Eddy directed appellant to get out of the car, and appellant complied. Officer Eddy conducted a pat-search and found a bag containing approximately three grams of marijuana in appellant's right front pants pocket. At that point, Officer Eddy placed appellant under arrest for possession of marijuana, and conducted "a more detailed custody search" to determine whether appellant had any weapons. During this search, Officer Eddy found in appellant's possession $466 in currency, an amount that suggested to the officer that "there was possibly more [marijuana in the car]." Officer Eddy then placed appellant in the back of the patrol car.

While appellant was in the patrol car, Officer Eddy observed him "moving around quite a bit ..., lurching forward, going backwards, moving around side to side." It appeared that appellant "was possibly trying to ... remove something from his person."

Officer Levy asked appellant if he had any narcotics concealed on his body. Appellant said he did not.

At some point after appellant was placed in the back of the patrol car, Officer Eddy searched the car. At some point prior to that, the officer determined that before he conducted a "hands-on search" of the car, he "[w]anted [a] canine to check the car to see if there [were] additional narcotics possibly concealed in the car." There was "an intervening time period" of approximately 15 minutes before the "K-9 officer" arrived, during which Officer Eddy "[was] trying to contact a K-9 unit to come conduct a search of the car ...." Officer Eddy searched the car after the K-9 officer arrived.

After appellant had gotten out of his car but before Officer Eddy placed him in the patrol car, Officer Eddy's partner performed a "warrant check" by means of police radio. At some point thereafter, Officer Eddy learned, by police radio, that a warrant for appellant's arrest on a misdemeanor charge had been issued.

After Officer Eddy observed appellant moving about in a suspicious manner in the patrol car and after appellant denied he had any more narcotics concealed on his body, Officer Eddy transported appellant to the jail. At the jail, before booking, appellant admitted that he had contraband concealed on his person. He then removed from the area of his buttocks what was later determined to be 4.64 grams of a substance containing cocaine.

Suppression Motions

At the close of the March 26 hearing, defense counsel argued as follows: Appellant's arrest for possession of marijuana was unlawful because appellant had less than an ounce of marijuana in his possession and produced his driver's license, and therefore was subject to citation, but not arrest. The seizure of the cocaine was the product of this unlawful arrest, and therefore that evidence should have been suppressed.

In the minute order in which the court denied the motion, the court stated: "Whether the 'arrest' was justified at the time of the discovery of the mar[i]juana on [appellant's] person is academic. A search of the car was justified by the strong od[o]r of mar[i]juana .... Defendant's detention in the back of the patrol car for that purpose was justified and reasonable. Once the outstanding [arrest] warrant was discovered, arrest and booking was justified and the evidence (cocaine base) thereafter given up by defendant is not subject to being suppressed." (Unnecessary capitalization omitted.)

Appellant subsequently renewed the motion. The court denied the motion by minute order without stating reasons for the denial.

DISCUSSION

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

DISPOSITION

The judgment is affirmed.